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OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE

WASHINGTON, D. C. 20301

POLICY REVIEW

MEMORANDUM FOR CHAIRMAN, DCI SECURITY COMMITTEE

SUBJECT: SCI Due Process Procedures

On November 13, 1980, the DCI Security Committee by a vote of 9 to 3, approved the draft of Annex B, "DCID 1/14 Appeals Procedures," for transmission to the NFIB. While the Office of the Secretary of Defense (OSD) supports implementation of an SCI due process procedure, draft Annex B as approved, potentially imposes a significant additional administrative and financial burden on the military services and is, therefore, unacceptable.

The OSD objections to the draft Annex B center on two primary concerns:

- (1) Equity and fairness dictate that a statement of reasons be provided before denial of SCI access occurs. Such a provision would afford the individual concerned an opportunity to respond to the allegations supporting the denial with additional information which might refute or mitigate the information upon which the denial or revocation is predicated. Notifying a person of the fact of a SCI denial without the reasons imposes a chilling effect on the person's ability to obtain appropriate due process remedies. The military services have successfully employed this concept for many years with collateral clearances.
- (2) An equitable appeals procedure does not necessarily require a personal appearance. A written notification of intent to deny or revoke access accompanied by the reasons therefore, an opportunity to reply in writing and the opportunity to appeal an adverse ruling to a higher authority satisfies, in our opinion, the test of equity and fairness. Since the DoD has approximately 100,000 SCI billets, a greater number than any other member agency of the intelligence community, the burden of a personal appearance would weigh most heavily on Defense. Each year a large number of applicants and incumbents, located all over the world, are denied SCI access. If only a small percentage requested a personal appearance, the financial impact on the military departments and DoD agencies would be considerable. It is anticipated that such a procedure would significantly delay an already lengthy clearance process, degrade an agency's ability to discharge its mission and cause the subject considerable hardship.

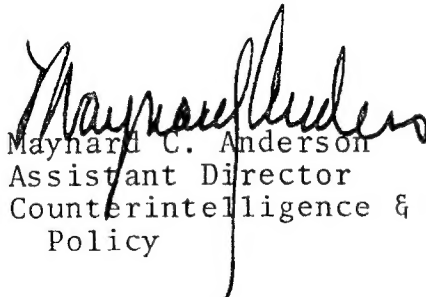
As a secondary matter, two additional concerns affect the OSD position on due process. The first involves the PRESTON case in which the Army agreed with the ACLU attorneys representing Warren G. Preston to include in the settlement agreement a due process procedure for contractors which is identical to that described above and in DoD 5200.2-R. Finally, it is our contention that, by adopting the Annex B provisions for SCI, it will not be long before DoD will be forced to apply the personal appearance requirement to collateral due process actions. Since the volume of denials and revocations of collateral clearances far exceeds that for SCI, such an eventuality would severely degrade, if not incapacitate, DoD's ability to operate its security clearance program in a timely and efficient fashion.

Therefore, OSD recommends that draft Annex B be rejected and the following wording substituted:

"Each Senior Intelligence Officer shall establish formal procedures to ensure that individuals to be denied access to SCI are notified of the impending denial and the reasons therefor, and are afforded a reasonable opportunity to respond prior to denial of such access."

The above wording has the advantage of allowing each SIO some latitude in implementing due process when considering unique aspects of his agency's operation, while at the same time providing commonality on the key due process elements of notice, reasons for denial and the opportunity to respond. By adopting such a policy, the intelligence community would be in conformance with recent legal trends and would insure just and equitable treatment of applicants and employees.

It is requested that the OSD position as outlined in this memorandum be forwarded to the members of the NFIB for consideration along with the draft Annex B to DCID 1/14.


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Director Webster had ruled out routine use but had sanctioned employment of the polygraph in specific cases to resolve questions. Mr. Welch suggested the Committee let the ISWG deal with polygraph considerations as part of their task to conduct an overall review of DCID 1/14. The Committee could then deal with polygraph recommendations as part of a complete package. Mr. Anderson suggested, and all members agreed to, the following recommendation: "the Investigative Standards Working Group further consider use of the polygraph for personnel security purposes beginning with periodic reinvestigations of personnel with SCI access." It was noted that the ISWG should give due weight to member comments favoring emphasis on counterintelligence questions in polygraph examinations. (U)

2. Appeals Procedures

The Chairman, noting member discussion at the SECOM seminar on procedures to appeal denials or revocations of SCI access, suggested that the basic issue of the principle of uniform procedures elevated to the NFIB since the Committee was divided on this subject. Mr. Anderson spoke in support of the alternative language his office had proposed, and suggested the Committee endorse a policy requiring appeals procedures but leaving their development and application up to SIOs. [redacted] emphasized the need for any appeals procedures to provide for exemptions in cases where national security considerations (e.g., "black" contracts) required such. After discussion of possible alternatives, members voted on a majority basis to support the proposed appeals procedures recommended by the ISWG as Annex B to DCID 1/14. Voting in favor were: Army, Air Force, CIA, DIA, FBI, Energy, Justice, SAFSS, State and Treasury. Voting against were: NSA, Navy and Defense. (U)

ITEM 2: New Business

The Chairman invited members' attention to a draft letter from him to the Office of Personnel Management (OPM) which would recommend changes to OPM's proposed regulations on reporting and use of investigative information it collected. He said OPM's proposal arose out of a settlement in the Jane Doe case, and the draft regulations were designed to insulate OPM from liability by deleting from investigative files information from OPM investigations